

THIS 76-3896

4 JAN 1977

STATINTL

I apologize for the delay in responding to your letter of March 1976 requesting a review of your eligibility for retroactive promotion or back pay for the period you, as a GS-11, were assigned to a GS-12 position. Your claim was one of several submitted in response to the publication of the Comptroller General decisions B183086 and B184990. The Office of General Counsel has made a lengthy and extensive review of the decisions and the regulations and laws on which they are based, and has advised that these decisions do not apply to Agency positions or personnel. The Civil Service Commission regulations involved in the Comptroller General decisions are not directly applicable to Agency employees and the Agency has no regulations of its own which mandate procedures comparable to the Civil Service Commission regulations.

The CSC regulations on which the ^{Comp Gen} General Counsel decisions are based are contained in Federal Personnel Manual (FPM), Chapter 300, Subchapter 8 and as noted above do not extend to employees of CIA. Coverage is expressly limited to details of employees serving in competitive positions or positions under the General Schedule. Title 5 U.S.C., Section 2102 defines the "competitive service" to include all appointive positions in the executive branch except "positions which are specifically excepted from the competitive service by or under statute." The Agency is specifically exempt from the provision of the Classification Act of 1949 as it relates to the classification of positions under the General Schedule and to pay rates for positions under the General Schedule. CIA employees are appointed under the authority of Section 8(a) of the CIA Act, which authorizes expenditures for personal services notwithstanding "any other provisions of law," and CIA positions are excluded from the competitive civil service.

With regard to Agency regulations, there is no provision for procedures comparable to those in the FPM Chapter 300, Subchapter 8, on which the Comptroller General decisions are based. While the CIA regulations provide as a matter of policy that "assignments will normally be made to a position at the employee's grade," they also allow for assignment to a position of higher grade for training purposes (the position affords the employee broader developmental opportunities) or because the employee is the best qualified person available at that time for the position. Moreover, it is significant in relation to this subject, the Agency has never determined directly or by implication from its practices, either prior or subsequent to the recent Comptroller General decisions, that its regulations require temporary promotions in the circumstances of your situation. As the Comptroller General acknowledges in these decisions, the interpretation of regulations by an agency charged with their administration is entitled to be given great weight.

The propriety of CIA's assignment policies has been acknowledged by the Comptroller General. In a decision dating back to December 1959 (B140877), it was held that mere adoption of the principles of the Classification Act in the Agency regulations, rules and actions does not require, in light of express exemption of CIA from the Act, and the Agency's unique statutory authorities, that CIA follow 5 U.S.C. 38 (now 3341) which essentially limits details to 120 days. The Comptroller General held that the employee's "qualifications were considered under the regulations of the Agency and determined to be proper" and that as the compensation received during the period was at the grade officially held during the period, there was no basis for allowing a claim for the additional compensation.

Accordingly your claim is denied insofar as it is based on the Comptroller General decisions B183086 and B184990. If the above does not satisfy your concern, please feel free to contact my office.

Sincerely,

(Signed) F. W. M. Janney

F. W. M. Janney
Director of Personnel

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